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**UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 SAN FRANCISCO DIVISION**

HUAWEI TECHNOLOGIES CO., LTD.,
 HUAWEI DEVICE USA, INC., and
 HUAWEI TECHNOLOGIES USA, INC.,

Plaintiffs / Counterclaim-Defendants,

v.

SAMSUNG ELECTRONICS CO., LTD.,
 SAMSUNG ELECTRONICS AMERICA,
 INC.,

Defendants / Counterclaim-Plaintiffs,

and

SAMSUNG RESEARCH AMERICA,

Defendant,

v.

HISILICON TECHNOLOGIES CO., LTD.,

Counterclaim-Defendant.

Case No. 16-cv-02787-WHO

**HUAWEI'S OPPOSITION TO
 SAMSUNG'S MOTION TO ENJOIN
 HUAWEI FROM ENFORCING THE
 INJUNCTION ISSUED BY THE
 INTERMEDIATE PEOPLE'S COURT OF
 SHENZHEN**

Hearing Date: March 14, 2018

Time: 2:00 PM

Judge: Hon. William H. Orrick

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1 Plaintiffs Huawei Technologies Co., Ltd., Huawei Device USA, Inc. and Huawei
 2 Technologies USA, Inc. (collectively, “Huawei”) hereby provides its opposition to Samsung’s
 3 Motion to Enjoin Huawei From Enforcing The Injunction Issued By The Intermediate People’s
 4 Court of Shenzhen (Dkt. Nos. 234-35 (“Br.”)).

5 **I. INTRODUCTION**

6 On January 11, 2018, the Intermediate People’s Court of Shenzhen, China (“Shenzhen
 7 Court”) found that Samsung infringed two of Huawei’s Chinese patents and issued an injunction that
 8 will not become effective unless and until it is affirmed by the appellate court. Before issuing that
 9 injunction, the Shenzhen Court made detailed findings that the patents are infringed and that Huawei
 10 has fully complied with its fair, reasonable and non-discriminatory (“FRAND”) licensing obligations
 11 and Samsung has not. Having lost the case, Samsung now asks this Court to enter an extraordinary
 12 preliminary injunction that would bar Huawei from ever enforcing this injunction. Samsung cannot
 13 come close to meeting the stringent factual and legal requirements for such relief.

14 Samsung’s argument that this lawsuit will dispose of the issues in the Chinese litigation and
 15 that the Chinese litigation somehow undercuts the jurisdiction of this Court stands in stark contrast
 16 to the crabbed view of the scope of this case that Samsung has urged before. While Huawei has
 17 consistently asked that this Court to set worldwide FRAND rates for the standard essential patent
 18 (“SEP”) portfolios of Huawei and Samsung in a voluntary effort to resolve the contractual dispute
 19 between them (including in China), Samsung has resisted that request at every turn and has even
 20 gone so far as to deny the jurisdiction of this Court to do so despite the fact that the U.S. is its largest
 21 market. And while Samsung now claims that this Court—and *only* this Court—should adjudicate
 22 the parties’ compliance with their FRAND obligations, Samsung has also consistently maintained
 23 that whether a party has *any* FRAND obligation (and what the FRAND rate might be for any
 24 particular patent) can only be determined after that patent had been determined to be valid,
 25 enforceable, infringed, and essential. This action will resolve those issues only with respect to no
 26 more than the ten asserted U.S. patents eventually tried. Under Samsung’s view, then, the Court
 27 would be in a position to evaluate the parties’ FRAND (and antitrust) compliance only with respect
 28 to any of those ten patents found to be valid, enforceable, infringed, and essential. Samsung’s

1 approach would leave the parties' FRAND licensing dispute as to all other SEPs (in China and
2 around the world) entirely unresolved.

3 Samsung cannot have it both ways. It cannot pretend that this Court will dispose of patent
4 litigation in other countries in order to derail those lawsuits while maintaining its challenge to the
5 basic authority of this Court to do so. Huawei's posture, by contrast, has been forthright and
6 consistent—it has always asserted that this Court has the power to set worldwide FRAND rates for
7 the parties' portfolios (as Judge Selna's recent decision in *TCL Holdings, Ltd. v. Telefonaktiebolaget*
8 *LM Ericsson* yet again confirms), that it will abide by those rates and suspend foreign litigation
9 involving its SEPs, once Samsung agrees to be bound by the terms set by this Court or an arbitral
10 tribunal. But while those issues are disputed and remain in doubt, Huawei has every right to pursue
11 independent actions on its patents in other countries.

12 That is why this case is the polar opposite of *Microsoft Corp. v. Motorola, Inc.*, 696 F.3d 872
13 (9th Cir. 2012) ("*Microsoft II*"), the case on which Samsung primarily relies. In that case, the party
14 seeking the anti-suit injunction, Microsoft, had asked the U.S. court to set FRAND rates for
15 Motorola's SEPs, and both parties agreed to that procedure. Moreover, the Court had declared that it
16 would do so in short order and in advance of any patent infringement trials. Motorola then
17 attempted an end-run around the previously agreed-upon U.S. procedure by seeking a crippling
18 injunction in Germany, where the court did not recognize Microsoft's breach of FRAND defenses.

19 Samsung's attempt to analogize its situation to Microsoft's is transparently false. Unlike
20 Microsoft, Samsung has never agreed to let a U.S. court set worldwide FRAND rates, and the Court
21 here has not yet ruled on the parties' disputed views of its authority to do so. Unlike Microsoft,
22 Samsung has had a full opportunity to adjudicate FRAND compliance in the foreign proceedings,
23 and it lost. Unlike Microsoft, Samsung does not face the prospect of a crippling foreign injunction
24 unless it capitulates and takes a license on the other side's terms—to the contrary, all Samsung needs
25 to do to end all of the patent cases in the U.S. and abroad is to agree that a third party, be it an
26 arbitration panel or this Court, will set true FRAND rates for both sides' portfolios.

27 Moreover, Samsung cannot make the requisite showing that preventing the litigation in
28 China from taking its course is necessary to vindicate any overriding U.S. policy, concerns about

1 vexatious or oppressive litigation, or other equitable considerations. As set forth in a Federal Circuit
 2 decision Samsung fails to cite, there is no “*per se* rule that injunctions are unavailable for SEPs,” and
 3 “an injunction may be justified where” (as the Shenzhen Court found was true of Samsung) the
 4 infringer “unilaterally refuses a FRAND royalty or unreasonably delays negotiations to the same
 5 effect.” *Apple Inc. v. Motorola, Inc.*, 757 F.3d 1286, 1331-32 (Fed. Cir. 2014). U.S. antitrust
 6 regulators take the same position, as has Samsung in other litigation where it has argued that
 7 “[w]hen faced with an intransigent licensee engaging in ‘reverse hold-up,’ a standards-essential
 8 patent holder has the right to seek and receive *any* statutory remedies available to it.” Ex. 1 at 7
 9 (emphasis added)¹. In light of Samsung’s tactics, Huawei properly sought to enforce the FRAND
 10 obligation in multiple forums, including seeking relief for infringement of its Chinese patents in the
 11 only court it could. Samsung resisted a FRAND determination in this Court, and participated fully
 12 in the Shenzhen Court proceedings. It would be inequitable to gratify Samsung’s inconsistent
 13 positions with a “do-over” of the Shenzhen Court’s determination that Samsung breached its
 14 FRAND obligations.

15 Indeed, granting the anti-suit injunction in these circumstances would intolerably and
 16 impermissibly offend comity by undermining the outcome of a full and fair proceeding in China – a
 17 proceeding whose outcome leaves Samsung unhappy but whose fairness is not seriously
 18 questioned. The Shenzhen Court made extensive and detailed findings and concluded that Samsung
 19 infringed Huawei’s patents and, [REDACTED]

20 [REDACTED]
 21 [REDACTED], it granted an injunction against Samsung’s
 22 continuing infringement. Samsung can appeal the Shenzhen Court’s ruling (and it has), and the
 23 injunction issued in the first instance by the Shenzhen Court will not be enforceable until that appeal
 24 is resolved. But Samsung’s motion asks this Court to undercut that appeal and presume that the
 25 Shenzhen Court reached the wrong result. If anything, the factual findings of the Shenzhen Court
 26

27 ¹ Unless otherwise noted, exhibits cited herein are exhibits attached to the Declaration of Nathan
 28 Greenblatt in Support of Huawei’s Opposition to Samsung’s Motion to Enjoin Huawei from
 Enforcing the Injunction Issued by the Intermediate People’s Court of Shenzhen.

1 should be accepted, fatally undercutting Samsung's motion, since findings from foreign courts
2 (including Chinese courts) operate as collateral estoppel in U.S. proceedings.

3 Finally, Samsung does not even argue, much less establish, the other prerequisites for the
4 extraordinary remedy of a preliminary injunction. Samsung fails to show irreparable harm or that
5 injunctive relief would be in the public interest. Samsung's shifting tactics and the Shenzhen
6 Court's determination that Huawei complied with FRAND confirm that the equities favor Huawei,
7 not Samsung. Regardless, the speculative "harms" suggested by Samsung's motion are entirely self-
8 inflicted in light of Samsung's refusal to accept a FRAND cross-license with Huawei or even to
9 accept the resolution of the underlying dispute by a neutral third party, including this Court.

10 Samsung's motion for an anti-suit injunction should thus be denied.

11 **II. BACKGROUND**

12 **A. The Parties**

13 Founded in 1987, Huawei has become a Fortune 500 company and a global leader in the
14 telecommunications industry. Huawei devotes significant resources to R&D, much of which is
15 focused on developing and improving cellular network technology standards, such as the 3G UMTS
16 and 4G LTE standards developed by the Third Generation Partnership Project ("3GPP") and
17 promulgated by standard setting organizations like the European Telecommunications Standards
18 Institute ("ETSI").

19 As of mid-2016, Huawei had disclosed to ETSI over 1,200 patent families (each of which
20 may contain multiple patents) that are or may be essential to practicing one or more of the 3GPP
21 standards. (Dkt. 59, Exs. 2.1-2.43). Huawei has committed to license these patents on FRAND
22 terms and conditions according to the ETSI IPR Policy on the condition that those seeking a license
23 from Huawei agree to make their SEPs available to Huawei on FRAND terms as well. (*Id.*)

24 Like Huawei, Samsung is a member of 3GPP and ETSI. As of mid-2016, Samsung had
25 submitted at least 53 declarations disclosing hundreds or thousands of patents that may be or become
26 essential to 3GPP standards. (Dkt. 59, Exs. 3.1-3.53.) Samsung has likewise committed to license
27 those patents on FRAND terms and conditions subject to reciprocity. (*Id.*)
28

B. The Parties' Negotiation History

Huawei and Samsung began discussing a cross-license in 2011. Initially, Samsung insisted that the parties negotiate [REDACTED] (Ex. 8 at HW_Samsung_001306997.) [REDACTED] (Ex. 9 at HW_Samsung_00131196; Ex. 36 at HW_Samsung_00130704). In May 2013, Samsung agreed to discuss [REDACTED] (Ex. 10), [REDACTED] [REDACTED] (Ex. 11). [REDACTED] [REDACTED] (Ex. 12.) [REDACTED] [REDACTED] (Ex. 13 at HW_Samsung_001321544-55.) [REDACTED] (Ex. 14.) [REDACTED] [REDACTED] (Ex. 15.) [REDACTED] (Ex. 16.) [REDACTED] (Ex. 17 at HW_Samsung_00230843.) [REDACTED] (Ex. 18) [REDACTED]; Ex. 19 [REDACTED] Throughout this period, Huawei repeatedly asked Samsung to [REDACTED]

1 [REDACTED] (Ex. 21 at HW_Samsung_00132220; Ex. 18 at
2 HW_Samsung_00230922; Ex. 19 at HW_Samsung_00230934; Ex. 20 at HW_Samsung_00230947.)

3 After Huawei escalated the issue within the parties' organizations, [REDACTED]
4 [REDACTED] (Ex. 22; Ex. 23) [REDACTED]
5 [REDACTED] (Ex. 24 at
6 HW_Samsung_00231198, 200.)

7 Over five years of pre-suit negotiations, Huawei made [REDACTED]

8 *See, e.g.*, Ex. 36 to Dkt. 234 ("Shenzhen Dec.") at 66-90, 186 [REDACTED]

9 [REDACTED])². [REDACTED]

10 [REDACTED]
11 [REDACTED] (Ex. 9 at HW_Samsung_00131196). [REDACTED]

12 [REDACTED] (Ex. 20.) [REDACTED]

13 [REDACTED]
14 [REDACTED] (Ex. 25 at HW_Samsung_00000018.)⁴ [REDACTED]

15 [REDACTED].⁵ (Exs. 26-27.)

16 _____
17 ² For purposes of this motion only, Huawei accepts the accuracy of the certified translation of the
18 Shenzhen Court's decision included with Samsung's motion.

19 ³ Samsung itself has begun negotiations with a similar (but higher) opening offer.. In connection
20 with an action it brought against Apple in the International Trade Commission, Samsung
21 acknowledged that it had made an opening offer to Apple of 2.4% for a license to its portfolio of 3G
22 SEPs, which it claimed "was in line with other published headline FRAND rates in the industry."
23 Ex. 2, Complainant Samsung's Corrected Response to Apple's Submission in Response to
24 Commission Notice of Review, Inv. 337-TA-794, at 11-12, 18; Shenzhen Dec. at 122. Huawei's
25 [REDACTED] from which it negotiates is in line with the published headline rates of others in
26 the industry, including Ericsson. *See* Shenzhen Dec. at 117-118, 202 ([REDACTED]).

27 ⁴ Samsung claims that Huawei's views on the desired scope of the license varied "wildly" over time.
28 (Br. 8.) [REDACTED]
29 focused [REDACTED]

30 [REDACTED] (See, e.g., Ex. 29 at HW_Samsung_00131588 [REDACTED])

31 ⁵ [REDACTED]
32 [REDACTED] (Ex. 27.)

1 In July 2015, four years after negotiations had begun, [REDACTED]
 2 [REDACTED]. (Ex. 28.) [REDACTED]
 3 [REDACTED]
 4 [REDACTED] (*Id.*) [REDACTED]
 5 [REDACTED]
 6 [REDACTED] (*Id.*) For a
 7 number of reasons, Huawei viewed this offer to be unserious.⁶ (*See, e.g.,* ; Ex. 31 at
 8 HW_Samsung_00848357; Ex. 26.) [REDACTED]
 9 [REDACTED]

10 [REDACTED].⁷

11 Throughout the course of the parties' negotiations, Huawei offered [REDACTED]
 12 [REDACTED]
 13 [REDACTED]
 14 [REDACTED] [REDACTED]
 15 [REDACTED]

16 _____
 17 ⁶ The royalty rate that Samsung derived [REDACTED]

18 [REDACTED]—is out of line with the rates typically paid and received in the industry. Samsung has paid
 19 other comparable holders of SEPs like Ericsson and Nokia billions of dollars for licenses to their
 20 SEPs while at the same time it proposed to pay Huawei [REDACTED] (Ex. 28; Exs. 38-40.)
 21 Indeed, Samsung's proposed rate of [REDACTED] rate (0.314%)
 22 recently determined by a U.S. court to be FRAND for Ericsson's comparable portfolio of LTE SEPs.
 23 *See* Ex. 3, *TCL Comm'n Tech. Holdings, Ltd. v. Telefonaktiebolaget LM Ericsson*, Case No. 8:14-cv-
 24 00341-JVS-DFM, Memorandum of Findings of Fact and Conclusions of Law (Dkt. 1802) at 114
 25 (C.D. Cal. Dec. 21, 2017). [REDACTED]

26 [REDACTED] Samsung itself reportedly paid InterDigital \$500
 27 million for a five-year license to InterDigital's complete, global portfolio. *See* Ex. 5. Like Huawei,
 28 [REDACTED]

29 ⁷ [REDACTED]
 30 [REDACTED] (Wang Decl. at ¶ 19.) [REDACTED]

31 [REDACTED] (*Id.*) [REDACTED]

32 ⁸ [REDACTED]

C. The Litigation

Given the lack of meaningful progress in negotiation of a cross-license over the prior five years, by early 2016, Huawei concluded that it had no choice but to seek to enforce its patent rights. To that end, on May 24-25, 2016, Huawei filed actions in the United States and China, asserting several of its declared SEPs and requesting that the courts assess the parties' compliance with their respective FRAND requirements under ETSI's IPR policy (among other requested remedies).⁹ In the infringement actions it brought in China, Huawei sought orders requiring Samsung to cease and desist from infringing its SEPs. Huawei notified Samsung of these actions when the lawsuits were filed. (Ex. 35.)

In the instant U.S. action, Huawei brought claims alleging that Samsung infringes eleven U.S. patents that Huawei claims are SEPs and, that through its failure to negotiate a FRAND cross-license in good faith, Samsung has breached its contractual FRAND licensing obligations under the ETSI IPR Policy. In addition, Huawei sought a declaratory judgment of the FRAND terms of a cross-license between the parties. Huawei's Complaint included a prayer for relief seeking an order prohibiting Samsung from seeking injunctive relief against Huawei which was predicated on the view that there would be no basis for an injunction if, as requested, the Court declared the terms of a FRAND license to Samsung's SEPs given Huawei's expressed willingness to enter such a license. Huawei has not sought preliminary injunctive relief attempting to halt any of the fourteen actions that Samsung itself brought in China seeking injunctive relief against Huawei on the basis of its alleged infringement of Samsung's SEPs, seven of which remain pending. (Wang Decl. ¶¶ 2-8.)

Subsequent to the filing of the parties' respective injunction actions in China, Huawei informed Samsung that it [REDACTED]

[REDACTED] (See Exs. 32-33, [REDACTED]).)

⁹ Samsung complains that Huawei has not sought damages in the Shenzhen actions. However, Samsung's counsel notes that Huawei has also initiated a FRAND rate-setting action in China, seeking to set the rate on all China LTE SEPs, so in effect Huawei has sought damages on the asserted Chinese SEPs. (See Xie Decl. at ¶ 22 (describing the rate setting action as specific to LTE Chinese patent portfolios).) Moreover, Samsung itself has not sought damages in the SEP infringement actions it has filed in China against Huawei. (Wang Decl. at ¶¶ 3-4.)

1 [REDACTED]
 2 [REDACTED] (Ex. 31, Sept. 6, 2016 Letter.) Samsung
 3 declined to do so. [REDACTED]
 4 [REDACTED] (Exs. 32-34.) And, in this Court, Samsung not only resisted Huawei's subsequent
 5 request that the parties' FRAND claims be bifurcated for prompt resolution, Samsung has repeatedly
 6 challenged the power of this Court to set FRAND royalties for the parties' SEP portfolios. (Dkt. 67
 7 at 5-9; Dkt. 85.) Samsung's counsel has repeatedly argued that before compliance with *any*
 8 obligation under the ETSI IPR Policy could be assessed, it must be shown that the patent is valid,
 9 enforceable, infringed, and essential. (Dkt. 67 at 6 ("In order for the Court to determine that either
 10 party has breached its FRAND obligations ... a jury must first determine disputed questions of
 11 patent validity, infringement, enforceability and essentiality to the relevant standards"); *id.* at 7
 12 ("[T]hese patent issues [infringement, validity, and essentiality] are inextricably intertwined with the
 13 FRAND and antitrust claims and must be resolved *before* the Court can properly address remedies . .
 14 . .") (emphasis added); Dkt. 82 at 11 (As a "prerequisite" to any obligation under the ETSI IPR
 15 Policy "you got to show it's infringed, and you got to show it's essential"); Dkt. 85 at 2 ("a
 16 necessary element of a contract claim ... involves assessing whether and to what extent [the] patents
 17 are valid, infringed, enforceable, and essential to the relevant ETSI standard"). Samsung denies that
 18 any of the patents asserted by Huawei—including the patents asserted in the Shenzhen Action—are
 19 valid, enforceable, infringed and essential. (Dkt. 67 at 7 ("Samsung denies any unauthorized use of
 20 any valid, enforceable, and essential patent in Huawei's complaint."); Shenzhen Dec. at 16-18
 21 [REDACTED]
 22 [REDACTED]

23 Samsung has also never consented to a global or U.S. SEP portfolio FRAND rate
 24 determination by this Court. Samsung has argued that a global FRAND determination is
 25 unworkable in part because it would require consideration of the parties' non-U.S. patents.¹⁰ (Dkt.

26 _____
 27 ¹⁰ Although Huawei believes that the Court has the power to set worldwide rates given the global
 28 scope of the parties' patents subject to underlying FRAND commitments, the parties' prior
 negotiations, and the parties' global sales of standard compliant products, *see Microsoft II*, 696 F.3d

67 at 7.) More fundamentally, Samsung has repeatedly insisted that the Court simply lacks the power to set the FRAND terms of a cross-license between the parties, arguing that even if the asserted patents are shown to be valid and infringed, “that does not justify the Court going beyond that and setting a worldwide rate ... based on [the] 11 [asserted] patents.” (Dkt. 82 at 12.) According to Samsung’s counsel, “Federal courts don’t do that.” (*Id.*; *see also id.* at 14 (“So the request under the dec[lartory] relief claim [seeking the setting of FRAND terms of a cross-license] ... makes absolutely no sense. It’s not feasible [and] there are serious issues as to whether it would be appropriate for a court do that.”). Indeed, Samsung has explicitly argued that, absent its consent—which it has refused to provide (Dkt. 67 at 8)—“the Court has no jurisdiction to ‘set’ FRAND terms for a general cross license.” (Dkt. 67 at 7; *see also id.* at 2 (asserting that Huawei had failed to establish subject matter jurisdiction over the FRAND rate setting claims and reserving right to seek dismissal with respect to that claim); Dkt. 85 at 4 n.1 (same).)

D. The Shenzhen Court Decision

In the proceedings before the Shenzhen Court, the court resolved [REDACTED] (1) whether Samsung has infringed the asserted Huawei SEPs and (2) if so, whether Huawei and Samsung had complied with their respective FRAND obligations such that an injunction against further infringement should issue. *See, e.g.*, Shenzhen Dec. at 177, 30. As Samsung acknowledges, “[a]s a predicate for its request for injunctive relief,” Huawei asked the Shenzhen Court to “resolve whether [Huawei’s] licensing efforts... were FRAND, and whether Samsung refused FRAND offers and breached its own FRAND obligations.” (Br. 15.)

The Shenzhen Court’s evaluation of these issues entailed an extensive presentation of evidence, expert opinion, and argument related to both infringement and the parties’ FRAND compliance. [REDACTED]

[REDACTED], witness testimony, and voluminous

at 885 (“[I]t is clear that there is a contract, that it is enforceable by Microsoft, and that it encompasses not just U.S. patents but also the patents at issue in the German suit.”), to the extent it would resolve Samsung’s objection, Huawei would be willing to confine the rate-setting determination in this Court to the parties’ respective portfolios of U.S. SEPs.

documentation. *See, e.g.* Shenzhen Dec. at 5-23 ([REDACTED])
 [REDACTED], 104-120
 [REDACTED]; Wang
 Decl., ¶¶ 10-14. [REDACTED].
 (Wang Decl., ¶ 13.)

Based on the evidence presented, the Shenzhen Court found that [REDACTED]
 [REDACTED]
 [REDACTED] Shenzhen Dec. at 205. [REDACTED]
 [REDACTED]
 [REDACTED] *See*
 Shenzhen Dec. at 200-203.

As to Samsung, the Shenzhen Court found that that [REDACTED]
 [REDACTED]
 [REDACTED]. Shenzhen Dec. at 180. It found further that
 [REDACTED]
 [REDACTED]
 [REDACTED] *Id.* at 185. The court faulted Samsung for
 [REDACTED]
 [REDACTED]
 [REDACTED] *Id.* at 186, 199, and 204-05.
 The Shenzhen Court concluded that [REDACTED]
 [REDACTED] *Id.* at 204.

III. APPLICABLE LAW

“Foreign anti-suit injunctions should not be issued routinely.” *Microsoft II*, 696 F.3d at 889.
See E. & J. Gallo Winery v. Andina Licores S.A., 446 F.3d 984, 989 (9th Cir. 2006) (power to issue
 anti-suit injunctions “should be used sparingly”) (quoting *Seattle Totems Hockey Club, Inc. v. Nat’l*
Hockey League, 652 F.2d 852, 855 (9th Cir. 1981); *see also China Trade & Dev. Corp. v. M.V.*

1 *Choong Yong*, 837 F.2d 33, 36 (2d Cir. 1987) (anti-suit injunctions should be “used sparingly”); *Gau*
 2 *Shan Co., Ltd. v. Bankers Trust Co.*, 956 F.2d 1349, 1354 (6th Cir. 1992) (“Comity dictates that
 3 foreign antisuit injunctions be issued sparingly and only in the rarest of cases.”); *Laker Airways Ltd.*
 4 *v. Sabena, Belgian World Airlines*, 731 F.2d 909, 927 (D.C. Cir. 1984) (anti-suit injunctions should
 5 be issued “only in the most compelling circumstances”).

6 An anti-suit injunction is a form of preliminary injunction. *See Gallo*, 446 F.3d at 990;
 7 *Microsoft II*, 696 F.3d at 883-84 (reviewing a “preliminary injunction [that] is also an anti-suit
 8 injunction”). In the Ninth Circuit, a party seeking a preliminary injunction must show “that he is
 9 likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of
 10 preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public
 11 interest.” *Alliance for the Wild Rockies v. Pena*, 865 F.3d 1211, 1217 (9th Cir. 2017), quoting
 12 *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).¹¹

13 However, “when a preliminary injunction is also a foreign anti-suit injunction, the likelihood-
 14 of-success aspect of the traditional preliminary injunction test is replaced by the *Gallo* test.”
 15 *Microsoft II*, 696 F.3d at 883-84. The *Gallo* test is a three-part inquiry. *Id.* at 881. First, the Court
 16 determines “whether or not the parties and the issues are the same in both the domestic and foreign
 17 actions, and whether or not the first action is dispositive of the action to be enjoined.” *Id.* (quotation
 18 marks omitted). Second, the Court determines whether one or more *Unterweser* factors apply,
 19 inquiring whether the foreign litigation would “(1) frustrate a policy of the forum issuing the
 20 injunction; (2) be vexatious or oppressive; (3) threaten the issuing court’s *in rem* or *quasi in rem*
 21 jurisdiction; or (4) where the proceedings prejudice other equitable considerations.” *Microsoft II*.
 22 696 F.3d at 881-82, quoting *Gallo*, 446 F.3d at 990. Third, the Court assesses “whether the
 23 injunction’s impact on comity is tolerable.” *Microsoft II*, 696 F.3d at 881 (quotation marks omitted).

24 **IV. ARGUMENT**

25 The stringent legal requirements for a preliminary, foreign anti-suit injunction require that
 26 Samsung establish that this case can dispose of the Chinese action, that Huawei’s Chinese action is

27 ¹¹ Alternatively, a preliminary injunction may still issue where the plaintiff makes a lesser showing
 28 of likelihood of success on the merits if the balance of hardships factor “tips sharply in the plaintiff’s
 favor,” and the other *Winter* factors are satisfied. *Alliance for the Wild Rockies*, 865 F.3d at 1217.

1 somehow inequitable, and that the anti-suit injunction Samsung seeks would not offend comity.
 2 Samsung must also establish the other, traditional elements of a preliminary injunction. Attempting
 3 to dodge these strict requirements, Samsung wraps itself in the Ninth Circuit’s anti-suit injunction
 4 decision in *Microsoft II*. But that attempt fails, for reasons that illustrate why Samsung’s motion
 5 cannot meet the strict requirements for the extraordinary relief it seeks.

6 **A. *Microsoft v. Motorola* Does Not Support Samsung’s Proposed Anti-Suit**
 7 **Injunction.**

8 Samsung relies almost entirely on *Microsoft v. Motorola*, in which the Ninth Circuit affirmed
 9 an anti-suit injunction barring Motorola from enforcing a German injunction on standard-essential
 10 patents against Microsoft. (*E.g.*, Br. 11, 13, 16, 19-21.) Samsung’s attempt to cast itself in the role
 11 of Microsoft, which committed to accept FRAND rates set by the U.S. court, is perverse.

12 Microsoft initiated a FRAND contract suit in U.S. district court against Motorola to establish
 13 its right to a FRAND license from Motorola, and asked the court to set a FRAND royalty. *Microsoft*
 14 *Corp. v. Motorola, Inc.*, 871 F. Supp. 2d 1089, 1099 (W.D. Wa. 2012) (“*Microsoft I*”). For the
 15 purposes of that proceeding, and in order to obtain a FRAND license, Microsoft did not contest the
 16 essentiality or infringement of Motorola’s standard-essential patents. *See Microsoft Corp. v.*
 17 *Motorola, Inc.*, No. C10-1923JLR, 2013 WL 2111217, at *59, *61 (W.D. Wa. Apr. 25, 2013)
 18 (“*Microsoft III*”). In short, Microsoft did everything it could to ensure that it could obtain a license
 19 from Motorola on FRAND terms, and the U.S. district court confirmed its intent to set those terms.
 20 *Microsoft I*, 871 F. Supp. 2d at 1099 (“[T]he court will conduct a trial to determine such terms,
 21 including a determination of a RAND royalty rate.”).

22 Samsung has refused to accept any of the positions that made the anti-suit injunction in
 23 *Microsoft* appropriate. In contrast to *Microsoft*—where Microsoft sought and Motorola consented to
 24 a FRAND determination—Samsung insists this is not a proceeding that can set a FRAND rate for
 25 Huawei’s patents. Further, unlike the party seeking an anti-suit injunction in *Microsoft*, Samsung
 26 refuses to concede that Huawei’s patents are standard-essential, and insists on contesting
 27 infringement and validity of thousands of patents on a patent-by-patent basis (a practical
 28

1 impossibility) rather than determining a FRAND royalty at the portfolio level as the *Microsoft* court
 2 did. *See* § II.C, *supra*.

3 Nor can Huawei's litigation conduct be in any way analogized to Motorola's conduct in
 4 *Microsoft II*. Huawei filed its Chinese and U.S. suits at the same time because it did not know what
 5 aspects of the larger dispute each court would be willing to resolve; it was not an end run around this
 6 action. Huawei's preferred course was to have a single forum (be it this Court or an arbitral tribunal)
 7 determine the terms of a FRAND cross-license to the parties' SEPs, thus mooting any other
 8 litigation. But Samsung resisted that approach, and has objected to any global FRAND
 9 determination here. Because Samsung has not presented its objection formally, the Court has not yet
 10 ruled on it. While Huawei believes the Court unquestionably has the power to do so, given
 11 Samsung's prior positions, Huawei expects that Samsung will attempt to prevent this from occurring
 12 through motion practice before trial.¹² At least until Samsung agrees to allow and be bound by the
 13 FRAND determination by this Court or the Court has ruled on Samsung's objections to the
 14 procedure, Huawei is fully justified in pursuing other cases.

15 In sharp contrast to Huawei's efforts, Motorola filed its German suit in an effort to derail the
 16 U.S. FRAND case already in progress. *See Microsoft II*, 696 F.3d at 879, 886. While the Shenzhen
 17 Court explicitly found Huawei's negotiation conduct consistent with FRAND, Motorola pursued an
 18 injunction in Germany while demanding royalties that the district court later determined were vastly
 19 in excess of FRAND. *Compare Microsoft Corp. v. Motorola, Inc.*, 795 F.3d 1024, 1053 (9th Cir.
 20 2015) ("*Microsoft IV*") ("[T]he jury could infer that demanding a 2.25% royalty rate was not a good-
 21 faith effort to realize the value of the technology . . .") with *Microsoft III*, 2013 WL 2111217, at
 22 *101 (court-determined RAND royalty rates for Motorola's patents total approximately 4 cents per
 23
 24
 25

26 ¹² Samsung has strategically sought to reserve its right to present such an objection. Dkt. 67 at 2
 27 ("Samsung contends that Huawei, as yet, has not set forth a sufficient basis for its request for
 28 Declaratory Judgment of FRAND Terms and Conditions for a Cross-License, and Samsung reserves
 its rights to seek dismissal or other appropriate relief on any such claim, including on the basis of
 lack of subject matter jurisdiction."); Dkt. 85 at 4 n.1 (same).

Xbox, or less than 0.02% per unit). Motorola's suit thus served no purpose other than to force Microsoft to accept non-FRAND terms. *See Microsoft IV*, 795 F.3d at 1046.¹³

Finally, Samsung's discussion of the Shenzhen decision leaves out an additional, critical distinction with *Microsoft v. Motorola*. As the Ninth Circuit observed, the German court "rejected the argument that Motorola's [F]RAND commitment ... created a contract enforceable by Microsoft," and issued an injunction following a finding of infringement. *Microsoft II*, 696 F.3d at 879. The German court thus issued its injunction without ever evaluating whether Motorola had complied with its FRAND commitment. In contrast, the Shenzhen Court considered and decided the underlying FRAND issues *before* determining that an injunction may issue, because Samsung (the infringer) had not complied with FRAND. Those findings demonstrate the propriety of the Shenzhen Court's injunction, and also why it should give rise to collateral estoppel effect in the U.S. when final. *See Walia v. Aegis Center Point Devs. Private Ltd.*, 2014 WL 296003 at *2 (N.D. Cal. Jan. 27, 2014) ("Collateral estoppel applies to foreign judgments so long as the parties in the prior action were afforded due process rights."); *see also U.S. v. Kashamu*, 656 F.3d 679, 683 (7th Cir. 2011) ("U.S. court[s] [] generally give preclusive effect to [a] foreign court's finding as a matter of comity.").

B. Samsung's Proposed Injunction Fails the Ninth Circuit's *Gallo* Test.

In order to demonstrate any entitlement to an anti-suit injunction, Samsung must establish all three elements of the *Gallo* test. But as demonstrated below, the first *Gallo* element contradicts Samsung's entire theory of this case, and Samsung cannot establish either of the remaining two elements.

1. Samsung Contradicts Its Own Litigation Position in Claiming this Case Is Dispositive of the Chinese Action.

¹³ The district court and Ninth Circuit later found that Motorola had consented to a determination of a FRAND rate in the U.S. court, and a jury determined that Motorola had breached its FRAND commitment by attempting to obtain injunctions against Microsoft while demanding excessive, non-FRAND royalties. *Microsoft IV*, 795 F.3d at 1039, 1046-47.

1 The first *Gallo* inquiry concerns “whether or not the parties and the issues are the same in
 2 both the domestic and foreign actions, and whether or not the first action is dispositive of the action
 3 to be enjoined.” *Microsoft*, 696 F.3d at 881 (quotation marks omitted). Huawei does not dispute
 4 that the parties are functionally the same.¹⁴ However, Samsung’s consistent position throughout the
 5 course of this case is that the issues before this Court are sharply limited. Under Samsung’s
 6 interpretation, this case is incapable of disposing of the Chinese action. As Samsung concedes, the
 7 Shenzhen Court investigated FRAND compliance and found that Samsung had failed to comply with
 8 FRAND. (Br. 9, 15.) But in this proceeding, Samsung contends that the Court must resolve
 9 “disputed questions of patent validity, infringement, enforceability, and essentiality to the relevant
 10 standards before even reaching the FRAND issues.” (Dkt. 67 at 6.). Samsung has also maintained
 11 that this Court lacks the authority to set a FRAND rate that would even potentially dispose of the
 12 Chinese action. *See* § II.C, *supra*.

13 After insisting for more than a year that this case could not dispose of actions like the
 14 Chinese action, Samsung now asks this Court to ignore everything it said before. But “[c]ourts
 15 derive the ability to enter an anti-suit injunction from their equitable powers,” *Gallo*, 446 F.3d at
 16 989, and Samsung’s contradiction of its longstanding litigation position does not merit exercise of
 17 this Court’s equitable power. To the contrary, doctrines of estoppel counsel that Samsung should be
 18 barred from now claiming entitlement to an anti-suit injunction. “Equitable estoppel prevents a
 19 party from assuming inconsistent positions to the detriment of another party.” *United States v.*
 20 *Georgia-Pacific Co.*, 421 F.2d 92, 96 (9th Cir. 1970). And judicial estoppel “protect[s] the integrity
 21 of the judicial process by prohibiting parties from deliberately changing positions according to the
 22 exigencies of the moment.” *New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001) (quotation
 23 marks and citations omitted).

24 Here, Samsung insisted that this Court should not begin with the FRAND and perhaps never
 25 reach it at all. While Huawei vigorously disagrees with those positions, it faced a risk that this Court
 26 might agree, and/or may otherwise decline to reach the FRAND issues. Unless this Court or other
 27 appropriate forum as agreed by the parties sets a global FRAND rate, this case will not dispose of

28 ¹⁴ The parties are not identical. Samsung Electronics Co., Ltd. is not a party to the Shenzhen cases.

the dispute in China based on Chinese patents. Accordingly, to ensure that Samsung's conduct in violation of FRAND be adjudicated, Huawei had no choice but to initiate and maintain actions elsewhere. Now that the Shenzhen Court concluded that Samsung's conduct does not comport with FRAND, Samsung has reversed course. Directly contradicting itself, Samsung now suggests that this case is "the centerpiece for [the parties'] worldwide contractual FRAND dispute" (Br. 17)—although Samsung carefully avoids making any commitment or consent that this Court can and should decide the FRAND terms of a *global* patent cross-license or the parties' FRAND compliance with respect to any patent before that patent has been conclusively determined valid, enforceable, infringed, and essential. As the Supreme Court has observed, "judicial estoppel forbids use of intentional self-contradiction . . . as a means of obtaining unfair advantage." *New Hampshire*, 532 U.S. at 751 (quotation marks and citations omitted). Samsung's attempt to establish the first element of the equitable *Gallo* test thus fails.¹⁵

2. The *Unterweser* Factors Do Not Support an Anti-Suit Injunction.

Even if this Court were to ignore Samsung's inconsistency, "duplication of parties and issues alone is not sufficient to justify issuance of an antisuit injunction." *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 928 (D.C. Cir. 1984). As the D.C. Circuit explained (in a decision the Ninth Circuit's *Gallo* decision relies on extensively, *see* 446 F.3d at 994), "[t]he mere filing of a suit in one forum does not cut off the preexisting right of an independent forum to regulate matters subject to its prescriptive jurisdiction." *Laker Airways*, 731 F.2d at 927-28 (noting "the rule favoring parallel proceedings in matters subject to concurrent jurisdiction"); *see China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 36 (2d Cir. 1987) ("Since parallel proceedings are ordinarily tolerable, the initiation before a foreign court of a suit concerning the same parties and issues as a suit already pending in a United States court does not, without more, justify enjoining a

¹⁵ While Samsung mentions its antitrust and contractual FRAND claims in passing, it fails to articulate any likelihood of success on those claims that could result in final relief enjoining Huawei from obtaining an injunction elsewhere. (*See* Br. 12-17.) As the Ninth Circuit held in *Microsoft II*, "a ballpark, tentative assessment of the merits of the contract dispute is intrinsically bound up with the threshold anti-suit injunction inquiry." 696 F.3d at 884. The Shenzhen Court has already examined the same predicate facts underlying Samsung's claims, and found that Huawei met its FRAND commitments while Samsung did not. Samsung will be collaterally estopped and cannot show any likelihood of success on its antitrust and FRAND claims.

1 party from proceeding in the foreign forum.”). As explained above, Huawei’s simultaneous filing of
2 parallel proceedings here and in Shenzhen seeking to vindicate its FRAND rights are entirely
3 appropriate.

4 Accordingly, as a threshold to any anti-suit injunction, Samsung is required to establish that
5 Huawei’s parallel proceedings in China “frustrate a policy” of this forum, that they are “vexatious or
6 oppressive,” or that the suits prejudice other equitable considerations. *See Gallo*, 446 F.3d at 990.
7 None of those factors apply.

8 **First**, Samsung’s contention that Huawei’s actions in China would “frustrate a policy” of this
9 forum (Br. 18-19) entirely ignores the Federal Circuit’s position on the availability of injunctions for
10 infringement of standard-essential patents, and misstates prevailing U.S. policy on that subject. In
11 *Apple*, the Federal Circuit affirmed a district court’s ruling holding that a standard-essential patent
12 holder was not entitled to an injunction, but made clear that there is no “*per se* rule that injunctions
13 are unavailable for SEPs,” noting that “an injunction may be justified where an infringer unilaterally
14 refuses a FRAND royalty or unreasonably delays negotiations to the same effect.” 757 F.3d at 1331-
15 32. In this case, Samsung *has* engaged in unreasonable delay. Further, the Shenzhen Court found
16 [REDACTED], yet Samsung has
17 refused to take a license. In these circumstances, the Shenzhen Court’s injunction does not frustrate
18 U.S. policy. To the contrary, the Shenzhen Court’s findings demonstrate this is a scenario that the
19 Federal Circuit deemed appropriate for injunctive relief.

20 Additionally, contrary to Samsung’s claims (Br. 4), U.S. regulators have outlined similar
21 conditions in which injunctive relief may be appropriate on SEPs—including in circumstances
22 consistent with Samsung’s conduct. For example, the Department of Justice and U.S. Patent &
23 Trademark’s 2013 Policy Statement on Remedies for Standard Essential Patents Subject to
24 Voluntary F/RAND Commitments (Ex. 9 to Dkt. 235) notes that injunctive relief “may still be an
25 appropriate remedy in some situations,” including where—as here —the “putative licensee refuses to
26 pay what has been determined to be a F/RAND royalty” or constructively refuses to negotiate “such
27 as by insisting on terms clearly outside the bounds of what could reasonably be considered to be
28 F/RAND terms in an attempt to evade the putative licensee’s obligation to fairly compensate the

patent holder.” *See* Stake Declaration, Dkt. 235, Ex. 9 at 7. More recently, the head of the Antitrust Division of the Department of Justice stated that the problem of “hold out” or “reverse patent hold-up” (where an implementer unjustifiably delays entering into license agreements for SEPs as Samsung has done here) is a greater threat to innovation than patent hold-up by SEP holders, and expressed the view that an SEP holder cannot violate the antitrust laws by seeking an injunction.¹⁶ *See* Ex. 4 at 5-6, 8 (M. Delrahim, “Taking It to the Limit: Respecting Innovation Incentives in the Application of Antitrust Law,” Nov. 10, 2017). That position directly contradicts Samsung’s claim that Huawei’s mere pursuit of injunctive relief on its SEPs violates U.S. antitrust law, and Huawei certainly cannot face liability under the U.S. antitrust laws for having obtained a *foreign* injunction in accordance with the law of the issuing jurisdiction.¹⁷ Samsung’s attempt to draw support from Huawei’s statement in another FRAND litigation concerning the availability of injunctions (Br. 18) fails for similar reasons. As Huawei explained there, an accused infringer should be given an “opportunity to accept a FRAND rate determined by a court or arbitrator” before facing an injunction (Br. at 18) (citing Ex. 42)—but Samsung has been given both of those opportunities, and has rejected them. Huawei’s prior statements are thus entirely consistent with its position here.

In contrast, Samsung’s current claim that any injunction on an SEP “violates U.S. antitrust law” (Br. 18) or is in some other contrary to U.S. policy is entirely inconsistent with Samsung’s prior positions and litigation conduct. While Samsung claims that it has “not preemptively asserted its patents in an attempt to shut out competitors” (Br. 7), in litigation in this District, Samsung sought injunctions on SEPs against Apple. *See, e.g.*, Dkt. No. 80 in *Apple Inc. v. Samsung Electronics Co.*

¹⁶ Assistant Attorney General Delrahim’s views have been echoed by many others, including current and former judges and antitrust regulators. *See, e.g.* Ex. 37.

¹⁷ The act of state doctrine, a long-standing common law principle that derives from considerations of international comity, precludes a U.S. court from evaluating the validity of actions of a foreign state. *See W.S. Kirkpatrick & Co. v. Env’tl Tectonics Corp. Int’l*, 493 U.S. 400, 406 (1990); *In re Philippine Nat’l Bank*, 397 F.3d 768, 772 (9th Cir. 2005). An action will be barred under the act of state doctrine “if: (1) there is an official act of a foreign sovereign performed within its territory; and (2) the relief sought or the defense interposed in the action would require a court in the United States to declare invalid the foreign sovereign’s official act.” *Credit Suisse v. U.S. District Court for the Central District of California*, 130 F.3d 1342 (9th Cir. 1997) (quotation marks omitted). A foreign court judgment arising out of private litigation, like the Shenzhen Court’s decision, may be considered an act of state “when it gives effect to the public interest of the foreign government.” *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L’Antisemitisme*, 433 F.3d 1199, 1226 (9th Cir. 2006); Shenzhen Dec. at 176 ().

1 *Ltd.*, No. 5-11-cv-01846 (N.D. Cal. June 30, 2011) at 59. And in related litigation in the
 2 International Trade Commission, where Samsung sought an exclusion order barring importation into
 3 the U.S. of Apple’s infringing devices, Samsung insisted: “[T]he existence of a FRAND undertaking
 4 with respect to a particular patent does not preclude the issuance of an exclusion order based on
 5 infringement of that patent. There is no basis in law, equity or the public interest that would warrant
 6 adoption of a bright-line rule [to the contrary]... .” Ex. 1 (Complainant Samsung’s Initial
 7 Submission in Response to Commission Notice of Review, Inv. No. 337-TA-794 at 7.) As
 8 Samsung’s expert witness explained to the ITC, if owners of standard-essential patents “have no
 9 recourse to a penalty for such behavior from licensees, such as seeking an exclusion order against
 10 implementers not negotiating in good faith, then implementers will have little to no incentive to take
 11 licenses.” Ex. 1 (Declaration of Anne Layne-Farrar, Ph.D. In Support of Samsung’s Statement on
 12 the Public Interest, Exhibit A to Initial Submission, ¶ 29.)

13 Samsung’s argument that Huawei has used foreign litigation to evade contractual obligations
 14 or compliance with U.S. law (Br. 18) is equally baseless. Samsung itself has taken the position that
 15 “[n]othing in any ETSI rule or policy precludes injunctions.” Ex. 1 at 9-10. Moreover, Huawei is
 16 trying to *enforce*—not evade—the contractual FRAND obligations both here and in China in
 17 accordance with respective laws of each venue. Its actions are complementary, not contradictory.

18 **Second**, Samsung’s attempt to characterize Huawei’s Chinese actions as “vexatious or
 19 oppressive” (Br. 19-20) also fails. There is no basis for Samsung’s claim that Huawei has engaged
 20 in “forum-shopping.” (Br. 19.) Huawei filed this action and the Chinese cases simultaneously
 21 because it did not know (and still does not know) the scope of ultimate rulings from this Court on
 22 FRAND. The Shenzhen litigation is neither duplicative nor vexatious because Huawei committed
 23 from the beginning to stay or dismiss those actions if Samsung would simply agree to let this Court
 24 or an arbitral tribunal determine the FRAND terms of cross-license. Samsung urged this Court to
 25 delay reaching the FRAND issues, which helped ensure that the Shenzhen Court resolved the
 26 FRAND issues first. Samsung fully participated in the Chinese actions, but does not like the result.
 27 Samsung now turns to this Court in an attempt to overturn the Shenzhen Court’s ruling that Huawei
 28

1 is entitled to an injunction because Samsung's conduct is not consistent with FRAND. If there is
 2 any forum-shopping (or other vexatious, oppressive conduct) involved here, it is by Samsung.

3 Additionally, contrary to Samsung's suggestion, there is no evidence that Huawei is engaged
 4 in hold-up. The Shenzhen Court determined that [REDACTED]
 5 [REDACTED]. These are
 6 circumstances where the Federal Circuit believes injunctions on SEPs may be available, *Apple*, 757
 7 F.3d at 1331-32, and where Samsung has argued injunctive relief is appropriate, *see* Exs. 1-2.
 8 Viewed in full, the statement of Ding Jianxin, Huawei's Head of Global Intellectual Property, that
 9 Samsung quotes (Br. 3) is consistent with these positions, and hardly suggests that Huawei intends to use
 10 any injunction to obtain anything other than a FRAND royalty.¹⁸ It is neither vexatious nor
 11 oppressive for Huawei to obtain relief that is consistent with remedies U.S. courts (and Samsung)
 12 have deemed available and appropriate.

13 **Third**, Samsung's arguments concerning the remaining *Unterweser* other "equitable
 14 considerations" (Br. 20-21) fare no better. Samsung suggests consumers could be harmed by a
 15 "holdup settlement" (Br. 20), but as noted above, there is no possibility of hold-up here because
 16 Huawei has committed to accept FRAND terms set by a third party, and neither consumers nor
 17 Samsung will be harmed by Samsung and Huawei entering a license on FRAND terms. Samsung's
 18 argument that it could be in an "impossible position" attempting "to satisfy conflicting rulings" (Br.
 19 20-21) confuses the possibility of inconsistent obligations with inconsistent adjudications. *See*
 20 *Delgado v. Plaza Las Americas, Inc.*, 139 F.3d 1, 3 (1st Cir. 1998) ("Inconsistent obligations occur
 21 when a party is unable to comply with one court's order without breaching another court's order
 22 concerning the same incident."). The Shenzhen Court found that Samsung infringed Huawei's
 23 Chinese patents, and that Samsung's conduct is inconsistent with FRAND. To comply with that
 24 order, Samsung should stop infringing and/or accept Huawei's offer of a FRAND license. This

25
 26 ¹⁸ In the portion of Mr. Ding's statement that Samsung selectively omits, he explains that seeking an
 27 injunction may be appropriate where, as here, an SEP holder is "faced with potential licensees who
 28 are negotiating in back faith [and are] unwilling to pay fair royalties." Dkt. 235, Stake Decl., Ex. 1.
 This is the same position Samsung has taken previously. Ex. 1 at 7 ("When faced with an
 intransigent licensee engaging in 'reverse hold-up,' a standards-essential patent holder has the right
 to seek and receive any statutory remedies available to it.").

proceeding will not address Samsung's infringement of Chinese patents, and neither party has asked this Court to order them *not* to enter into a FRAND license. There is no possibility of "conflicting" judgments that Samsung could be unable to comply with. *See Apple Inc. v. Qualcomm Inc.*, No. 3:17-cv-108-GPC-MDD, 2017 WL 3966944, at *15 (S.D. Cal. Sept. 7, 2017) (denying anti-suit injunction and rejecting argument that "it would be untenable or unfair for [a party] to have to alter its behavior territory by territory" in response to FRAND decisions from foreign courts).

Finally, like its "forum shopping" argument, Samsung's "race to judgment" argument ignores the facts. Huawei did not "test the waters in each court and then race to judgment" (Br. 21). In the face of Samsung's challenge to this Court's power to set a global FRAND rate, Huawei has sought all available relief, while committing to limit the litigation to this Court if Samsung would agree to let the Court set the FRAND rates. Based at least in part on Samsung's dragging its heels in this Court, the Chinese court reached that issue first. It is Samsung who "tested the waters," found the Shenzhen Court's ruling not to its liking, and now wants this Court enjoin the Chinese action (while still refusing to concede that this Court can fully resolve the dispute).

3. Samsung's Proposed Anti-Suit Injunction Would Offend Comity.

"Comity is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws." *Gallo*, 446 F.3d at 994 (quotation marks and citation omitted). Samsung claims this is "a private commercial dispute between two corporations, and does not implicate any foreign governments" (Br. 21), but only pages earlier in its brief, Samsung argued (incorrectly) that Huawei had violated U.S. antitrust law and frustrated U.S. policies (see *id.* at 18). Although it misstates U.S. law and policy, Samsung is correct that the parties' FRAND dispute is far from a limited private commercial dispute. As the Southern District of California observed, enforcement of SEP holders' FRAND commitments "has global consequences and is of global significance." *Apple*, 2017 WL 3966944, at *17.

1 The impact on comity is here not tolerable, because Samsung seeks to block the outcome of a
 2 full and fair proceeding, in which it fully participated. The Shenzhen Court was fully capable of
 3 resolving the FRAND issues that the parties placed before it, and Samsung had every opportunity to
 4 argue that its conduct was consistent with FRAND. But the court found [REDACTED]
 5 [REDACTED], and accordingly issued an injunction. If Samsung disagrees with that
 6 ruling, it can file (and has filed, *see* Br. 2) an appeal in China. But Samsung's motion improperly
 7 attempts to use this Court to collaterally attack the ruling of the Shenzhen Court. *See Gau Shan*, 956
 8 F.2d at 1355 (district court should not "convey[] the message, intended or not, that the [U.S.] court
 9 has so little confidence in the foreign court's ability to adjudicate a given dispute fairly and
 10 efficiently that it is unwilling even to allow the possibility"). Just as in *Apple*, an anti-suit injunction
 11 here would "effectively deprive" China "of its jurisdiction to consider" Samsung's SEP licensing
 12 conduct. *See Apple*, 2017 WL 3966944, at *18 ("That multiple sovereign and international bodies
 13 have concluded or alleged that aspects of Qualcomm's business model are anticompetitive
 14 demonstrates that this dispute implicates global public concerns in a way not evident from the record
 15 in *Microsoft v. Motorola*.").

16 **C. Samsung Fails to Establish Any Entitlement to the Extraordinary Remedy of a**
 17 **Preliminary Injunction.**

18 Samsung's motion focuses exclusively on the *Gallo* test, which replaces the "likelihood of
 19 success" prong of the preliminary injunction inquiry. *Microsoft II*, 696 F.3d at 883-84. Even if
 20 Samsung could satisfy each element of the *Gallo* inquiry (and as explained above, it cannot),
 21 Samsung otherwise fails to set out, much less establish, the necessary grounds for a preliminary
 22 injunction. In particular, while Samsung suggests that its activities in China face some potential
 23 disruption, does not argue or demonstrate a likelihood of irreparable harm absent the injunction it
 24 seeks. Further, the balance of equities and the public interest (also unaddressed by Samsung's
 25 motion) do not favor Samsung's proposed injunction.

26 **1. Samsung Fails to Show it Would Be Irreparably Harmed.**

27 Samsung cannot establish that it "is likely to suffer irreparable harm in the absence of
 28 preliminary relief," *Alliance for the Wild Rockies*, 865 F.3d at 1217, because Samsung can avoid any

possibility of an injunction in China by accepting Huawei's offer of a FRAND license or committing to a FRAND determination here or elsewhere. The Shenzhen Court found [REDACTED], and Huawei has not changed its offer in any way based on that court's decision, nor does Huawei intend to do so. Moreover, in this case Samsung has resisted Huawei's efforts to take up the FRAND issues first, which would also lead the parties to a FRAND license. Any consequences flowing to Samsung from its continued refusal to accept Huawei's FRAND offer, and its resistance to this Court's resolution of the FRAND dispute, are self-inflicted. *See Ventura Cty. Christian High Sch. v. City of San Buenaventura*, 233 F. Supp. 2d 1241, 1253-54 (C.D. Cal. 2002) (denying preliminary injunction where plaintiffs' claimed "irreparable injury" was "due in part to their own failure to obtain a judicial determination of their rights and obligations at some earlier point in time"); *Caplan v. Fellheimer Eichen Braverman & Kaskey*, 68 F.3d 828, 839 (3d Cir. 1995) ("If the harm complained of is self-inflicted, it does not qualify as irreparable.").

Notably, the potential "harm" Samsung alleges—moving manufacturing facilities out of China—appears to be activity Samsung is already undertaking, as it re-centers its South Asian manufacturing in Vietnam.¹⁹ While Samsung also mentions potential impacts to "consumer loyalty and reputation" (Br. 11), simply mentioning that possibility is insufficient to support issuance of a preliminary injunction. *See Dotster, Inc. v. Internet Corp. for Assigned Names and Numbers, Etc.*, 296 F. Supp. 2d 1159, 1163-64 (C.D. Cal. 2003) ("Although the loss of goodwill and reputation are important considerations in determining the existence of irreparable injury, there must be credible and admissible evidence that such damage threatens Plaintiffs' businesses with termination.").

2. The Balance of Equities Favors Huawei, Not Samsung.

The balance of equities here sharply favors Huawei. Huawei properly filed this suit and the Chinese actions to enforce its intellectual property and the FRAND commitment in an effort to bring about a FRAND resolution to its dispute with Samsung. As Samsung admits, the Shenzhen Court [REDACTED].” (Br.

¹⁹ *E.g.*, Ex. 6 (“Samsung has invested \$14.5 billion in Vietnam.... The attractions for Samsung include relative political stability, tax breaks and lower labor costs than in China.”); Ex.7 (noting in 2014 Samsung’s decreasing market share in China and shift to manufacturing in Vietnam).

9) (citing Shenzhen Dec.). Samsung has resisted any FRAND resolution and has already been found by the Shenzhen Court to have violated FRAND. To even advance its argument in favor of an anti-suit injunction, Samsung has had to contradict its prior positions before this Court. Worse, the injunction Samsung seeks is inequitably one-sided—as Samsung admits (Br. 9 n.3), Samsung is itself seeking injunctions (and not damages) in China in other suits against Huawei asserting standard-essential patents. Wang Decl., ¶ 3-4. And as noted above, Samsung has previously sought injunctions on SEPs *in this District*. If Samsung’s motion were granted, Samsung—who failed to follow FRAND, resisted any FRAND determination, and refused a FRAND license—would not only escape any consequences for its conduct, but could obtain injunctions of its own against Huawei, while Huawei is left without recourse. That result is plainly inequitable.

3. The Proposed Anti-Suit Injunction Is Not in the Public Interest.

The public interest does not support Samsung’s proposed injunction. As reflected in U.S. court decisions and regulatory policy, there is no *per se* rule that injunctions on standard-essential patents are unavailable even here in the United States. *See* § IV.B.2, *supra*. The public certainly has no interest in imposing such a *per se* rule on China when it does not even exist here. More broadly, the public interest does not support foreclosing injunctions against a party like Samsung, who conducted itself in violation of FRAND (as the Shenzhen Court found) and continues to refuse to take a license. Samsung’s proposed injunction is contrary to the public interest because it would reward Samsung for its delay tactics in licensing negotiations, and for its refusal to commit to a FRAND determination in this Court or any other forum. Instead, the public interest favors Huawei’s efforts to obtain what it is entitled to—reasonable compensation, on FRAND terms, for Samsung’s ongoing use of Huawei’s patents. *See Microsoft I*, 2013 WL 2111217, at *12 (“[T]he [F]RAND commitment must guarantee that holders of valuable intellectual property will receive reasonable royalties on that property.”).

V. CONCLUSION

For the foregoing reasons, Huawei respectfully requests this Court deny Samsung’s motion.

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